No. 12,666

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BRYON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Rehearing

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

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Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

Petition for Rehearing

I.

One of petitioners points is that the only acts and practices within the jurisdiction of the Federal Trade Commission are acts and practices which are either unfair to competitors, consumers, or both. To sustain this proposition the petitioners as part of their argument on this point cited the testimony of the late Commissioner Davis given before the committee. This testimony showed clearly that the only purpose of the Wheeler Lea Amendment was to give the commission additional jurisdiction to protect the consumer. On this point, the opinion herein refers to the history of the act and in a footnote sets out some of the comments made by the author of the amendment, Mr. Lea. In the footnote it is said:

> "Indeed, the principle of the act is carried further to protect the consumer as well as the competitior. In practice the main feature will be to relieve the commission of this burden, but we go further and afford

> a protection to the consumers of the country that they have not heretofore enjoyed."

And Senator Wheeler as set out in the same footnote stated:

> "This amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."

The review of the history of Section 5 (a) substantiates petitioner's contention that the only acts and practices which are within the jurisdiction of the Federal Trade Commission are acts and practices which are either unfair to competitors, consumers or both.

It is self-evident and the commission admits that the acts and practices complained of in this proceedings are not unfair to competitors or consumers. Therefore, petitioners conduct is not within the purview of the Federal Trade Commission Act and because of this the order issued herein should be set aside.

II.

Neither the case of Charles A. Brewer and Sons vs. Federal Trade Commission, 158 F. 2d 74, nor the Globe Cardboard Novelty Company case were decided upon the basis that the practices herein involved were unfair to competitors or consumers. Both cases were predicated upon the erroneous assumption that the intrastate use of punch boards is within the Federal Trade Commission Act. It is fundamental as both opinions are predicated upon this assumption that if the assumption is erroneous then the decisions are also erroneous. The assumption is without question erroneous because the Supreme Court has so held. In other words, these two cases have overruled the Supreme Court.

III.

It is the petitioners contention that what may have been said concerning Public Law 906, 81st Cong., 2d Sess., ap-

proved January 2, 1951, forbidding the transportation of slot machines has no bearing upon the power given to the Federal Trade Commission. Had the Bunte case been taken into consideration at the time, undoubtedly those remarks would not have been made. What the Supreme Court says certainly should have more authority than what the 6th Circuit says. When the Supreme Court construed the Federal Trade Commission Act remarks in a congressional report or statement by members of Congress cannot override the Supreme Courts ruling. Petitioners position is that the saving clause of the slot machine act must be interputed in the light of the holding by the Supreme Court in the Bunte case.

IV.

Petitioners failed to clearly present to this court their contention concerning the public interest. The opinion herein states:

> "Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest."

This is not our contention at all. Our contention is that it is not to the public interest as that expression is used in the Federal Trade Commission Act to issue a cease and desist order against petitioners shipping punch boards in interstate commerce. Our reasons are as follows: The stopping of the interstate shipment of punch boards will not in any degree minimize the distribution of merchandise by lotteries. Because punch boards are not the only devices used for this purpose so that if the use of all punch boards is eliminated the distribution of merchandise by lotteries would go on unabated. Furthermore, practically every state in the Union has some form of a punch board or push card factory, the local factories furnish all the punch boards needed. It seems to the petitioners that it is obvious that the public are not interested in the Federal Government spending all the money it is spending in proceedings of this type when the only result is that petitioners are stopped from shipping of punch

boards in interstate commerce which has absolutely no effect on the use of lotteries to distribute merchandise.

V.

Petitioner's wish to again press their point that the order issued herein is broader than the complaint, therefore the order must be modified in such manner as will bring it within the limited allegations of the complaint. On this point, the Supreme Court has held, in the case of Federal Trade Commission vs Gratz, 253 U. S. 421, 427 40 S ct, 572, 574, 64 L ed 993, "The things which may be prohibited is the method of competition specified in the complaint. Such an order should *follow the complaint*;" otherwise, it is improvident, and, when challenged will be annulled by the court."

The complaint alleges that:

> "Petitioners supplies to, and places in the hands of persons, firms and corporations the means of and instrumentalities for, engaging in unfair acts and the practices within the intent and meaning of the Federal Trade Commission Act." (Rec. 22)

Under the principle of law set out by the Supreme Court in the Gratz case, supra; the order should be modified to read as follows:

> The petitioners are ordered to cease and desist from placing in the hands of persons, firms and corporations the means of and instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

Respectfully submitted,

F. W. JAMES,
Attorney for petitioners

CERTIFICATE

Comes now the undersigned attorney for petitioners herein and hereby certifies that in his judgment this Petition is well founded and is not interposed for delay.

F. W. JAMES